COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
SUPREME COURT BUILDING
WASHINGTON 25, D. C.

ALBERT B MARIS
CHAIRMAN

AUBREY GASQUE
SECRETARY

CHAIRMEN OF ADVISORY COMMITTEES

DEAN ACHESON
CIVIL RULES

PHILLIP FORMAN
BANKRUPTCY RULES

JOHN C PICKETT
CRIMINAL RULES

WALTER L POPE
ADMIRALTY RULES

E BARRETT PRETTYMAN
APPELLATE RULES

April 3, 1962

TO: Chairman and Members of the Advisory Committee on Criminal Rules

FROM: Edward L. Barrett, Jr.

RE: Comments by members of the Committee on Reporter's Second Draft.

1. The purpose of this memorandum is to react to various suggestions received from committee members and to serve as a basis for discussion at our forthcoming meeting. Some redrafting is incorporated in this memorandum and should be studied.

2. The memorandum does not deal with Rule 5 and with Rules 10-17A as to which material has been circulated too recently for committee comment.

SUMMARY OF PROPOSALS FOR
DISCUSSION AT APRIL MEETING

RULES 1 and 2

No changes suggested.

RULE 3

The first draft proposed the addition of the words: "It may be made on information and belief." The Committee voted last June not to include these words. In the comments I have received so far on the second draft, Professor Remington, Judge Hoffman, and Mr. Ball have expressed their view that the language should be included. Judge Pickett, Judge McBride, Mr. Blue, and Professors Glueck and Pirsig have approved the elimination of the language. Unless reconsideration of the June vote is moved at our next meeting, I will assume that we propose no changes in Rule 3.

RULE 4

All persons commenting on the second draft have approved the draft and proposed Advisory Committee Note, except for a reservation expressed by Professor Remington and discussed below. Unless the Committee wishes to consider further his reservation, I assume that this amended rule is ready for inclusion in our Preliminary Draft.

Professor Remington has properly raised a professorial eyebrow at my statement in connection with the second draft that on motions to suppress evidence under Rule 41, the defendant may go beyond the face of the affidavits which formed the basis for issuance of an arrest warrant under Rule 4 or a search warrant under Rule 41. I agree that the matter is not as clear as suggested in my presentation.

The problem is this: Suppose that on a motion to suppress the defendant contends that the officer who made an affidavit which served as the basis for the issuance of a warrant in fact did not tell the truth in the affidavit. Defendant concedes that the facts stated in the affidavit are sufficient but asserts that the affiant did not have the information which he represented he had in the affidavit. Can the defendant in such a situation call the affiant, or other witnesses, to explore what facts actually were known to the affiant when he made the affidavit?

I have not found any cases in which the point was raised directly. Two cases suggest by inference that the defendant may present testimony on such a point. In Giordenello v. United States, 357 U.S. 480 (1958), the defendant claimed that while the affidavit of the officer, upon which an arrest warrant was issued, purported to be based on personal

knowledge actually it was based solely on hearsay. At the hearing on the motion to suppress the defendant was permitted to examine the officer and secure testimony from him to the effect that all of his information came from other persons. The Supreme Court appeared to approve this procedure but did not rule on the issue: "But we need not decide whether a warrant may be issued solely on hearsay information, for in any event we find this complaint defective in not providing a sufficient basis upon which a finding of probable cause could be made."

In Jones v. United States, 362 U.S. 257 (1960) the Court decided that hearsay evidence was sufficient to support a search warrant and found the affidavit sufficient on its face to support the warrant. The defendant in that case did not attempt to present evidence outside the affidavit, but contended merely that the commissioner should not have issued the warrant without taking affidavits from the persons who gave the information to the officer who made the affidavit. The Court did suggest, however, that a fuller exploration of the facts might be appropriate under other circumstances: "If the objections raised were that Didone had misrepresented to the Commissioner his basis for seeking a warrant, these matters might be relevant." It seems to me that Rule 41(e)(4) supports the same notion. Defendant may introduce evidence to show that "there was not probable cause for believing the existence of the grounds on which the warrant was issued."

My recommendation still is to the effect that we do nothing with this issue. The absence of cases suggests that the problem is not one of practical importance. Seldom will the defendant have any hope of proving that the officer lied to the commissioner. And if the officer did not lie and the facts stated are sufficient for probable cause, the defendant cannot make the arrest or search illegal by proving that the facts did not exist. The standard is probable cause to believe that the facts exist. In the rare case where the defendant has a chace to prove that the officer lied, I would be confident that the courts would permit the evidence on the subject. Until cases arise giving rise to problems, I hesitate to try to draft language on this point.

RULE 6

The principal issue presented as a result of the comments on the second draft relates to the wisdom of requiring that the minutes of grand jury proceedings be transcribed. Judge Pickett, Judge Hoffman and Mr. Blue oppose such a requirement. All other members commenting appear to approve it. Judge Hoffman suggests that as a practical matter there may not be a court reporter available in many districts for the purpose. In the light of his comment, which appears to me to be well taken, what would the committee think of providing for mechanical recording? Subdivision (d) might read as follows:

"Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking evidence, a stenographer or operator of a mechanical recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting. The testimony of all witnesses before the grand jury shall be recorded."

The second sentence of subdivision (e) might then begin as follows: "Otherwise a juror, attorney, interpreter, stenographer, operator of a mechanical recording device, or any typist who transcribes recorded testimony may disclose . . . ."

Everyone has approved the minor change suggested for subdivision(f).

Those commenting on the issue have approved the reporter's recommendation that no attempt be made to define the term "judicial proceedings" in subdivision(e).

RULE 26 A

This proposed new rule is vigorously attacked by Judge Hoffman (with the concurrence of Mr. Blue) and vigorously defended by Mr. Ball. Judge Walsh also opposes its adoption. The others who have commented appear to approve.

Judge McBride has urged that the rule should go even further and give to the judge discretion to order disclosure in advance of trial in appropriate cases in order to reduce delay is trials.

In the absence of any suggestions concerning the drafting of the rule, the issues appear to be joined on the fundamental policy considerations.

RULE 7

1. In reporter's second draft of Dec. 15, it was recommended that no attempt be made to modify the rule to encompass the problem in the Schaffer case. Comments to date indicate general agreement as to this recommendation.

2. The reporter also recommended that no attempt be made to provide for compulsory joinder of offenses. While most members of the committee appear to agree with this recommendation, strong dissents are registered by Judge McBride, Mr. Ball, and Professors Glueck and Remington. In order to provide a focus for discussion at our meeting I have attempted a draft of a proposed rule set out below with my comments. This draft, needless to say, is based on the proposals so carefully made by Professor Pirsig.

RULE 8A
NECESSARY JOINDER OF OFFENSES

(a) Joinder. All offenses based on the same act or transaction which are known to the attorney for the government at the time of the filing of an indictment or information shall be included in that indictment or information if they are triable in the same district. Offenses required to be joined hereunder may be tried separately when so ordered by the court pursuant to Rule 14.

(b) Dismissal. If all offenses are not joined as required in subdivision(a) the court, on motion of the defendant made prior to trial, shall order the dismissal of the indictment or information. Failure of the defendant to make such motion prior to trial shall constitute a waiver of the joinder required in subdivision(a).

Several problems occur to me:

(1) Is the standard for joinder too broad or too narrow? The Illinois statute and Prof. Pirsig's proposal use the narrower standard of "same act". That used here is taken from the permissive joinder provisions of present rule 8 and has the advantage of long judicial interpretation of what is meant by "same act or transaction." The ALI standard is much broader including three tests: "same conduct"; "series of acts or omissions motivated by a purpose to accomplish a single criminal objective, and necessary or incidental to the accomplishment of that objective to the accomplishment of that objective"; "series of acts or omissions motivated by a common purpose or plan and which result in the repeated commission of the same offense or affect the same person or the same persons or the property thereof."

(2) Should the requirement be limited to offenses known to the attorney for the government or should it also include offenses known, in the words of the ALI proposal, "to the proper officer of the police"? My judgment is that the only practicable standard is that of offenses known to the attorney for the government -- otherwise the range of inquiry into undisclosed information of government agents would be limitless.

(3) Should the joinder provision be enforced by making failure to join a bar to future prosecutions as in the ALI proposal or, as suggested by Professo. Pirsig and proposed here, merely by providing for a pre-trial dismissal on motion by the defendant? I strongly prefer the latter approach. The issue can be resolved at a time when it is practically feasible to probe into what is "known" to the attorney for the government. If the determination is against the government, the defendant will not be freed from liability. Instead the government can get a second indictment to include all the offenses which should be joined.

(4) Even in the limited form presented what will be the practical impact on the government in those situations where they are ready to proceed on one offense but are still investigating another? Suppose a defendant is arrested for interstate transportation of a stolen car under the Dyer Act. The government suspects that the car was stolen and used by the defendant as the get-away car from a bank robbery. I assume the two offenses might be part of the same "transaction". Must the government turn the defendant loose and not indict him on the Dyer Act charge until such time as they have completed the investigation -- which might take months -- to determine if the defendant should also be charged with bank robbery? This type of problem would be, I suppose, a reason for limiting the scope of joinder to the "same act." Yet, would the "same act" test take care of cases like Ciucci where the defendant shot each of the victims and then burned the house down?

On balance, I still have serious doubts about the wisdom of a compulsory joinder rule. I recognize that there are cases where it appears outrageous to permit the government to have several bites at the apple (even though the motivation for such action is understandable when the government has no appeal) but I don't see how to take care of those cases without also imposing real practical difficulties in the administration of justice.

(5) With respect to the problem in the Milanovich case I recommended that no attempt be made to do anything in the rules. There seems general agreement except for Judge McBride and Mr. Ball. Since I am at a loss as to how to draft a rule on the subject without getting into the substantive law and providing for the consequences with reference to the particular kind of a crime, I have not

attempted to do any more on the subject. I adhere to my original recommendation that we leave this problem to be resolved, legislatively or judicially, along with the substantive problem of determing the circumstances in which multiple punishment will be permitted.

RULE 9

A majority of those commenting on the alternatives set forth in the reporter's second draft favor making no change. Further reflection has strengthened my conclusion that no useful purpose would be served by making a change here.

Insofar as we are talking about cases begun by the filing of an information, I suppose Prof. Remington is right in asking how many cases there are where an information will be filed prior to the arrest of the defendant. I suspect these are so few that to indicate a preference for the use of the summons here is of no practical significance.

If we are serious about wanting to induce greater use of the summons we should be doing it in Rule 4 -- since most cases will fall in the category of complaint filed but neither indictment returned nor information filed. Given all of the practical problems, however, I can see no alternative but to rely on the good sense of government attorneys. I suppose we could put in a hortatory sentence -- "Summons shall be used instead of warrants when ever there is no serious risk that the defendant will not appear as directed" -- but what would be accomplished?

RULE 18

As I interpret the expressions of opinion by members of the committee, only Mr. Ball opposes the elimination of division venue. Judge McBride expresses no opinion. All others appear to favor this result.

The other question as to which the responses are not so clear is whether the rule should provide any standard for fixing trial within the district or leave it to the unfettered discretion of the judge. In the light of the responses it seems to me that we should have a vote on the following alternative formulations of the rule.

(1) "Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. In fixing the place for trial within the district the court shall consider the convenience of parties and witnesses."

(2) "Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. The court shall fix the place of trial within the district."

RULE 19

If the vote to eliminate division venue stands, then Rule 19 should be deleted.

RULE 20

The draft as it was submitted in the reporter's second draft appears (apart from suggested additions) to be satisfactory to Judge Hoffman, Judge Pickett (with continuing doubts as to the necessity for the change), Profs. Glueck, Pirsig and Remington, Judge McBride and Mr. Ball. Judge Walsh approves of everything but the last sentence of subdivision (c).

Mr. Blue raises the fundamental objection whether there is any reason to attempt to hasten the Rule 20 process since the defendant usually gets credit for time served. My assumption was that we should give the defendant the option to expedite the process -- of course, he can always refuse to consent to transfer until he has received a copy of the indictment or information and has had an attorney's advice. If Mr. Blue's point is a valid one (and I gather that Judge Pickett probably agrees) then I would recommend that no changes be made in Rule 20 as it now stands except the two changes adding the words "or held" and "is held". With his point, subdivision (b) is not worth doing. Rather than wait for a copy of the complaint he might as well wait for a copy of the indictment or information. WHAT DOES THE COMMITTEE NOW THINK?

Judge Walsh suggests that the last sentence of subdivision(c) read: "The defendant's statement shall not be used against him unless, when it was made, he was represented by counsel and had been furnished with a copy of the indictment or information" This amendment would conform to what is presently the situation under Rule 20 and I see no objection to it as thus limited.

Judge Hoffman and Professor Remington raise again the question of extending Rule 20 to Juvenile Delinquency proceedings. Clearly the procedure of Rule 20 is not appropriate -- there may never be a complaint, indictment or information, nor a plea of guilty. I have now tried my hand at a draft which I think accomplishes the result. What does the committee think of the following language?

"A juvenile (as defined in 18 U.S. Code §5031) who is arrested or held in a district other than that in which he is alleged to have commited an act in violation of a law of the United States not punishable by death or life imprisonment may consent to be proceeded against as a juvenile delinquent in the district in which he is arrested or held. The consent shall be given in writing before the court but shall be received by the court only after the court has fully apprised the juvenile of his rights, including the right to be returned to the district in which he is alleged to have committed the act, and of the consequences of such consent."

If language like that above were adopted, it would be necessary to modify the second sentence of Rule 54(b)(5) because the proposed language is inconsistent in part with 18 U.S.C. §5033 -- in that it permits consent to be given in the district of arrest instead of only in the district "having cognizance of the alleged violation."

RULE 21

1. The draft as submitted by the reporter in his second draft appears to have the approval of everyone commenting except Judges Hoffman and Walsh and Prof. Pirsig.

2. Judge Hoffman suggests that we change the word "shall" to "may" in the first line of subdivision(b). The word "shall" is in the present rule and does not appear to have given rise to a substantial amount of difficulty. What does the committee think?

3. Judge Walsh suggests that in lieu of the draft of subdivision(a) proposed by the reporter, we amend it to read as follows:

"The court upon motion of the defendant shall transfer the proceeding as to him to another district or division ~~whether or~~ not ~~such district or division is specified in the defendant's motion~~ if the court is satisfied that there exists in the district or division where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial."

This proposal would eliminate any standards for the judge in ruling on such a motion. Judge Walsh suggests we do it this way because there may be no district free of prejudice -- but in any event cannot the defendant continue to make a Rule 21(a) motion in every district to which the case is transferred? I am inclined to favor Judge Walsh's suggestion as a neater job of drafting than mine and because I am not certain we add anything beyond trouble by trying to state a standard. What does the committeee think?

4. Judge Walsh also votes against the amendment to subdivision(b). My opinion is still in favor of clarifying the point here and permitting transfer of all counts instead of forcing a severance in every case.

5. Prof. Pirsig makes again a much more inclusive proposal. I gather he would like to see subdivision(b) read as follows:

"The court upon motion of the defendant shall [may?] transfer the proceeding as to him to another district or division if the court is satisfied that such a transfer would be in the interest of justice."

What does the committee think? Should the determination as to venue be left in all cases within the combined discretion of the defendant and the judge?

6. The reporter now concludes that it is not necessary to include the last sentence which he proposed to add for subdivision(b) because of the "as to him" language in the initial sentences of subdivisions (a) and (b).

7. If Rule 18 is proposed with the elimination of division venue, then this rule should be changed to eliminate references to divisions.

RULE 22

No change has been suggested.

RULE 23

1. The reporter recommended a minor change for Subdivision (c) and all members of the committee who have made comments appear to agree except Mr. Blue who regards the change as unnecessary.

2. The reporter raised the question whether the requirement of government consent to waiver of jury trial should be eliminated. Only Professor Pirsig has indicated a desire to discuss the question.

RULE 24

1. Judge Hoffman has circulated a proposed revision of subdivision (b) limiting the number of peremptory challenges. The committee should be prepared to vote on his proposal.

2. The reporter is now of the opinion that it might be wise to adopt the suggestion of Mr. Blue and limit the change in subdivision (c) to increasing the number of possible alternates to six with a corresponding change of the provision for additional peremptory challenges. For an argument for such limitation, see the attached letter from Professor Kaplan.

RULES 25-28

No changes suggested. Judge Hoffman raises some questions about Rule 28.

RULE 29

The rule as proposed in the reporter's second draft has been generally supported in the comments made by committee members.

Judge McBride questions the desirability of preserving the discretion of the judge to reserve decision on the motion when made at the end of all the evidence. As I remember it, the committee voted to retain this discretion to deal with cases where the judge must do research before ruling. To save the need for holding the jury pending such research, the case is submitted to them. What does the committee now think?

The reporter now wishes to suggest a change in the time limit in this rule and in rules 33 and 34. Under this suggestion the last part of the first sentence in subdivision (b) would read ". . . or within such further time <u>not exceeding 5 days</u> as the court may fix during the 5-day period." Such a change will simplify some problems under Rule 37 and the reasons for it will be discussed there.

RULE 30

The only question here is that raised by Judge Hoffman. I suppose there are three alternatives which the committee can select:

(1) Leave the rule as is with the matter in the discretion of the judge.

(2) Change the rule by casting the last sentence to read: "Opportunity shall be given to make the objection out of the hearing or presence of the jury." This would make it clear that the judge could do it either way.

(3) Change it to read: "Opportunity shall be given to make the objection out of the ~~hearing~~ presence of the jury." Such a change would obligate the judge to excuse the jury on request of counsel.

My own preference would be to make no change. I think it would be unwise to compel the judge to excuse the jury whenever a request is made by counsel. If we are going to leave the judge with discretion in the matter, then it seems to me that the present form of the rule is adequate.

RULE 31

Shall we amend the second sentence by adding the words "in writing"?

The other pending question here is whether we should proceed as suggested by Professor Remington to define more fully what is a "necessarily included offense."

I confess to a continuing reluctance to get into this problem. There are relatively few federal cases dealing with the issue -- not enough to give a factual basis for change. The language proposed in Model Penal Code §1.08(4) would, as I see it, create more problems of judicial interpretation than would leaving the present language in Rule 31. Consider, e.g., the proposal to state that an offense is included when "it is established by proof of the same or less than all the facts required to establish the commission of the offense charged." What does this mean? Suppose that the same conduct constitutes the violation of two separate criminal statutes: Would the model penal code language mean that it must be left to the jury to decide which statute applies? Isn't that decision rather one of law -- which statute did Congress intend should apply? Or did Congress intend to leave the choice with the prosecuting officer? See Berra v. United States, 351 U.S. 131. Or suppose that the defendant is charged with an offense which requires proof of facts 1, 2, 3 and 4. The proof establishes only facts 2, 3 and 4. Can the prosecutor have an instruction to the effect that the defendant can be convicted of a separately defined crime which requires

proof of only facts 2, 3 and 4? Even though this second crime carries a higher penalty? See Jones v. United States, 238 F.2d 681 (C.A.9, 1956).

The problem covered in Model Penal Code §1.08(4)(b) is presently covered in Rule 31. As to the language from §1.08(4)(c), discussed by Professor Remington in his letter of March 7, I have difficulty in visualizing its application in concrete cases in the federal system.

What does the committee think?

RULE 32

1. There appears to be general agreement with the amendments proposed to subdivision(a).

2. As anticipated, there is still substantial controversy over the amendment proposed to subdivision(c)(2). The issues would appear to be the following:

a. Judge Hoffman and Mr. Blue have expressed their opposition to any form of mandatory disclosure. This should be decided by the committee. In my view if the committee supports the non-mandatory position, then the very least we could do (and it would not be much) would be to simply substitute "may" for "must".

b. Judge Hoffman expresses his fear that disclosure of certain facts would inevitably result in the disclosure of the source of the information. He says: "For example, if a wife reveals that the defendant drinks excessively at home, this is a reported fact, but the source may be confidential. To reveal the fact is a disclosure of the source." If the fact that the defendant drinks at home is going to be relevant in the determination of his sentence, is this not the very kind of a case (as Judge McBride suggests) where the defendant should be informed even though it gives him ample reason to suspect who gave the information? On the one hand, there is the risk that wives would not give such information if they thought it was going to be disclosed. On the other hand, there is the risk that the wife might feel free to give false information because she knows it is not going to be disclosed. I don't know which risk is the greater but in a decent system of law can we justify imposing consequences on a defendant based on such information without giving him a chance to reply? Who knows, it might turn out that the wife was the drinker. (We have just had a child custody case in San Francisco involving a prominent and respected mother who denied to all that she drank to excess. But forced to face the facts in a courtroom she told a quite different story.)

c. Several suggestions have been made for modifying the language proposed by the reporter while still making disclosure mandatory.

i. Judge Walsh suggests a fairly simple change to the effect that the court "shall disclose in general terms to the defendant or his counsel, etc." If this means that the court can say: it is reported that you drink to excess in the home, that you have suffered the following

prior convictions, that on numerous occasions you have severely beaten your children while drunk, that it is recommended that you not be granted probation but sentenced to prison for a term in excess of one year -- if such statements qualify as "in general terms" I have no serious quarrel with the proposal.

ii. Judge McBride and Prof. Remington suggest we might limit disclosure to matters the judge intends to take into consideration. Perhaps it might read as follows --

"... shall disclose to the defendant or his counsel any facts contained in the report of the presentence investiga tion which the court intends to take into consideration in passing sentence and afford an opportunity to the defendant or his counsel to comment thereon."

What does the committee think? Should we, at any rate, eliminate the reference to "conclusions of the report."? On further thought triggered by a comment of Judge Hoffman's I am not certain what I mean by "conclusions." Perhaps the issue to be faced is whether the defendant should be entitled to know what "recommendations", if any, the probation officer has made. I don't see the same compelling need for revealing the "recommendations" as for revealing the "facts." What does the committee think?

iii. Prof. Glueck suggests the use of the word "advise" instead of "disclose". I am not certain that this changes anything. What does the committee think?

3. It appears that a large number of post-conviction hearings under 28 U.S.C. §2255 result because defendants who pleaded guilty received sentences substantially larger than they anticipated. Their surprise may be the result of representations made by prosecution or defense counsel, from failure of the judge to fully inform the defendant of the possible consequences, or from an unpredictably heavy sentence. The problems here might be less serious if we could insure that all defendants had representation by counsel which was adequate enough to explore the total situation and bring to the attention of the prosecutor and the judge all the extenuating circumstances in the particular case. Certainly we do not have such representation now in the general run of cases.

Is there anything we can do in the rules to alleviate the situation? One possibility would be to give the defendant a right within a limited period (10, 20, 30 days) after sentence is imposed to set aside the conviction and withdraw his plea of guilty. If such a right could be coupled with a provision to the effect that failure to exercise it constitutes a waiver of any objections to the validity of the manner in which the plea was received (Rule 11) or in which the sentence was imposed (Rules 32(a) and 43), would this increase or decrease the burden presently imposed on the system? Would it result in more just results?

Would it be a desirable (or undesirable) curb on the sentencing discretion of the judge?

Another radical provision would be to provide that a plea of guilty could be interposed with a specification in the plea of the maximum punishment to be given. Either the attorney for the government or the judge could refuse to permit such a plea, in which event the defendant could choose either to plead not guilty or guilty without condition. A limited version of this idea exists in California. Where the crime is divided into degrees the defendant, with approval of the prosecutor and judge, may specify the degree in his plea of guilty. Cal. Pen. C. §§1192.1, 1192.2. Where the jury on a plea of not guilty would have the power to recommend or impose a certain punishment (e.g., life imprisonment instead of death), the plea may specify the punishment. Cal. Pen. C. §1192.3.

Does the committee have any interest in exploring these ideas?

4. Comments so far indicate general approval of the proposed new subdivision (f). However, two questions have been raised:

a. Judge Walsh worries about removing the power of summary revocation of probation and suggests it might be enough to permit the defendant to have a hearing within 10 days on a motion to set aside the order of revocation. I would have no serious objection to this but I wonder what it would accomplish. Presumably the defendant can be "summarily" arrested on a charge of violation of probation and held in custody until the revocation hearing. Doesn't this accomplish the same result with the necessity of only one order by the judge?

b. Professor Glueck worries that we may be making the proceeding too formal. The present draft leaves the matters vague enough that the trial judge has considerable discretion as to the degree of formality he will permit. I am inclined to recommend that we try it in its present form. (I might add that my private worry is not that probation officers are apt to abuse their discretion in the direction of recommending probation revocation -- rather I think they may excuse too many lapses. But revocation of probation may come upon the initiative of law enforcement officers, too.)

RULE 33

1. Comments received to date indicate general concurrence in the draft submitted.

2. The reporter would now like to suggest two modifications:

(a) Delete the proposed new language in the second sentence. It seems redundant.

(b) As proposed in connection with Rule 29 amend the last sentence so that the extension provisions read:

"within such further time not exceeding 5 days as the court may fix during the 5-day period."

Such an amendment will simplify the appeal problems under Rule 37 and I see no reason in a criminal case why a longer extension should be necessary. See Judge Hoffman's similar recommendation in his discussion of Rule 37.

3. In connection with this rule and rule 34 Mr. Blue notes that we are eliminating any power of the court to rule on its own motion. This is intentional -- see the discussion in the reporter's first draft. If the court acts on its own motion, does not it become impossible to try the defendant again because of double jeopardy? See the suggestion to that effect in United States v. Smith, 331 U.S. 469. Of course, the judge can always accomplish the same result by suggesting to the defendant within the 5 day time limit that a motion would be looked upon with favor.

RULE 34

1. Comments to date indicate general approval.

2. I propose, and for the same reason as in Rules 29 and 33, that the last phrase be amended to read:

"within such further time not exceeding 5 days as the court may fix during the 5-day period."

RULE 35

Since the reporter's second draft in which it was recommended that no change be made, the Supreme Court has decided the case of Hill v. United States, 82 S.Ct. 468 (1962).

In the Hill case the defendant in 1954 was sentenced (after conviction by a jury) to 23 years. In 1959 he began proceedings under 28 U.S.C. §2255 contending that when he appeared for sentencing the court did not ask him whether he wished to make a statement in his own behalf. The record was clear that the court had failed to give the defendant this opportunity. The majority of the Court held: (1) the error was not so fundamental as to authorize relief under 2255; and (2) treating the proceeding as one to correct an illegal sentence under Rule 35, the defendant was not entitled to relief: ". . . the narrow function of Rule 35 is to permit correction at any time of an illegal sentence, not to re-examine errors occurring at the trial or other

proceedings prior to the imposition of the sentence. The sentence in this case was not illegal. The punishment meted out was not in excess of that prescribed by the relevant statutes, multiple terms were not imposed for the same offense, nor were the terms of the sentence itself legally or constitutionally invalid in any other respect."

Justice Black, with the concurrence of the Chief Justice and Justices Douglas and Brennan, dissented. He did not discuss the question re 2255. Instead he argued that Rule 35 properly applied -- "that a sentence imposed in an illegal manner -- whether the amount or form of the punishment meted out constitutes an additional violation of law or not -- would be recognized as an 'illegal sentence' under any normal reading of the English language." He said that the case should be reversed and remanded to allow the district court to resentence defendant after granting him his right to speak.

The question at issue as a result of the Hill case appears to be whether without any limitations as to time and without any necessity for showing prejudice beyond that implicit in the violation of the rules a defendant may have a sentence set aside and a new sentence entered in two situations: (1) where the court failed to comply with the procedures of Rule 32(a) in sentencing and (2) where the court imposed sentence out of the presence of the defendant in violation of Rule 43. Perhaps also involved would be a case where the court imposed sentence without providing the defendant with counsel as provided in Rule 44.

It seems to me that three possible courses of action could be pursued by the committee:

(1) Leave the rule as is. This would mean under the Hill case that defendant can attack the manner in which a sentence is imposed only on appeal or, where he can show an error serious enough to be regarded as constitutional or jurisdictional, under 2255.

(2) Amend the first sentence of the rule to accord with the position taken by the dissent in the Hill case. Such an amendment might read:

"The court may correct an illegal sentence or a sentence imposed in an illegal manner at any time."

(3) Take an in-between position and permit motions to correct sentences imposed in an illegal manner within a defined period of time. Such an amendment might add a sentence like the following at the beginning of Rule 35, leaving the rest of the rule intact:

"The court may correct a sentence imposed in an illegal manner within 60 days after imposition of the sentence."

My recommendation is that we adopt the third course of action. Giving the defendant the right to have second thoughts and come back to challenge the manner in which the sentence was imposed within a relatively brief period should have the result of making the courts less receptive to challenges long after the event in 2255 motions. I think the second alternative would be unfortunate since I see nothing so peculiarly prejudicial about the kinds of errors at issue here as to permit the defendant an indefinite period in which to have them corrected.

RULE 36

No change suggested.

RULE 37

The draft submitted by the reporter on January 24 has been generally approved by those members of the committee who have commented.

The reporter (partly as a result of correspondence with Professor Ward, Reporter for the Committee on Appellate Rules) now has additional problems and queries to be considered by the committee:

(1) Should a motion under Rule 29, as well as Rules 33 and 34, serve to extend the time for appeal? Why, I wonder, was no extension provided originally? Offhand, I see no reason for not including it in the extension provision.

(2) If as recommended earlier, we limit to 5 days the period of permissible extensions of time in which to enter motions under Rules 29, 33 and 34, we will eliminate one difficulty under Rule 37. The motions will have to be made within the 10 day appeal period. As discussed above, I believe this to be desirable.

(3) Is there any sentiment for extending the time in which an appeal may be taken? I gather from Professor Ward that the Appellate Rules Committee wonders if we have considered the possibility. My preliminary conclusion is that no change should be made. An extension from 10 days to 30 days might remove the possibility that a lawyer unfamiliar with the criminal rules would assume that he had the same time as available in civil cases. But the risk that delays to 30 days would become the norm instead of the exception and the problems involved in handling custody of the defendant (would he be kept in local custody until the time for appeal expired?) militate against the change. Perhaps the provision for relief from default will solve the difficult cases here.

(4) The rules are not now clear on one point. Suppose the defendant files a motion for new trial under Rule 33 or in arrest of judgment under Rule 34 and then, before the court rules, files a notice of appeal. Is the notice of appeal effective to transfer jurisdiction to the court of appeals? If so, must there be a remand before the court can grant such a motion? If not, must the defendant file another notice of appeal after the denial of his motion under Rules 33 or 34? [Rule 29 would be included in the problem if we provided an extension for such motions.]

I can find no cases on this point. Under the civil rules apparently a motion for a new trial prevents the filing of an effective notice of appeal until the new trial motion is disposed of and a motion for new trial made after the appeal is filed cannot be granted without remand. See 6 Moore, Para. 59.09(4)(5).

Do we need to face this problem or does it arise so seldom as to make it unnecessary to worry over it? To take care of both problems two sentences would need to be added somewhere -- perhaps either to Rule 37 or Rule 39:

"A notice of appeal filed while a valid motion for a new trial or in arrest of judgment [or for acquittal] is pending shall not serve to transfer jurisdiction to the appellate court until the denial of the motion. A valid motion for a new trial or in arrest of judgment [or for acquittal] filed while an appeal is pending may be granted only on remand of the case."

(5) Would it not be appropriate to change the language of the "excusable neglect" provision to read:

"Upon the filing of a motion supported by an affidavit or affidavits showing good cause the court may etc."?

Doesn't "good cause" better state what we mean than "excusable neglect"?

(6) I have had an exchange of correspondence with Professor Ward with reference to the in forma pauperis appeal problem. He points out that the principal question is what kind of a record the defendant can bring to the appellate court when the question is on the issue of "good faith." He raises the question whether there might not be some method for requiring trial counsel to stay with the case through the finish of the proceedings on the motion for leave to appeal in forma pauperis to facilitate the creation of an informal, inexpensive record. The appointment of other counsel makes this almost impossible short of transcribing the record in every such case. See also a similar suggestion by Judge Ridge in 24 F.R.D. 241. What does the committee think ?

In my view only one solution makes sense. Congress should amend 28 U.S.C. §1915(a) to eliminate the requirement of a showing of good faith in criminal cases -- perhaps the last sentence could read:

"An appeal in a civil case may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith".

Should this committee recommend such action by Congress? If the state of California can shoulder the financial burden of providing free transcripts in criminal cases to all defendants, indigent or otherwise, without any showing of good faith, certainly the federal government can afford to do the same for indigent defendants.

(7) The reporter would also like to raise a new matter coming from a query from Professor Ward. Should we not amend subdivision 37(a)(1) to simplify the form for the notice of appeal? Although the cases generally excuse deficiencies, it is still worth considering why so much is required -- more in fact than in civil cases. Note that Civil Rule 73(b) provides: "The notice of appeal shall specify the parties taking the appeal; shall designate the judgment or part thereof appealed from; and shall name the court to which the appeal is taken." My preference would be for something even more general. Cf. California Rules on Appeal, Rule 31(b): "If the appeal is by the defendant the notice shall be signed by him or by his attorney . . . The notice shall be sufficient if it states in substance that the party appeals from a specified judgment or order or a particular part thereof, and shall be liberally construed in favor of its sufficiency."

(8) Another new matter: Would it be advisable to amend the second sentence of present Rule 37(a)(2) to read:

"When a court after trial imposes sentence upon a defendant ~~not represented by counsel~~, the defendant shall be advised of his right to appeal and of the procedures for seeking leave to appeal in forma pauperis, and if he so requests, the clerk shall prepare and file forthwith a notice of appeal or a motion for leave to appeal in forma pauperis on behalf of the defendant."

It is my impression that defendants -- whether they have had counsel of their own choice or appointed counsel -- may often not get effective representation during the period immediately following judgment. Why not tell every defendant of his right to appeal and offer to do the paper work for him? In view of the tremendous expansion in post-conviction review under 2255, by coram nobis, and otherwise, would it not be better to facilitate direct review and get the matters considered at that time?

RULES 38 and 39

Left for consideration by the Committee on Appellate Rules.

RULE 40

No change suggested.

RULE 41

The reporter now recommends that no changes be made in this rule and that no committee note of comment be prepared. Two issues are involved:

(1) In the reporter's second draft it was recommended that no change be proposed in subdivision(b). The principal problem is whether provision should be made for search warrants to seize items which are evidentiary only. Prof. Remington recommends that we either provide for warrants for such purpose or have better reasons than I have advanced for not doing so. My reasons for not so providing are as follows:

(a) The Supreme Court's rule against seizure of objects merely evidentiary while presently obscure in scope appears to have constitutional roots and to apply to searches without warrant as well as with. See the review of the scant case law in Note, 20 U of Chi.L.Rev. 319.

(b) The constitutional issue may now be resolved since under the Mapp decision the court may have to rule on warrants issued to seize evidence in states like California and Wisconsin which provide for them. I would prefer awaiting such resolution, without any comment from this committee casting doubt on the validity of the state provisions, or otherwise.

(c) No demand or pressure for expanding the ground for issuance of warrants has come to us from the federal agencies directly involved.

(2) The only amendments proposed in the second draft went to the issue of appealability of pre-trial suppression orders. Everything which those amendments sought to accomplish has now been taken care of by the Supreme Court in DiBella v. United States, decided on March 19. In that case the Court held: (1) "When at the time of ruling there is outstanding a complaint, or a detention or release on bail following arrest, or an arraignment, information, or indictment -- in each such case the order on a suppression motion must be treated as 'but a step in the criminal cas preliminary to the trial thereof'" and hence not subject to independent appeal. (2) Motions made and ruled on in the district of seizure rather than the district of trial shall also be regarded as interlocutory and not subject to appeal when a criminal proceeding is pending. Since the Court has dealt so admirably with the question of appeal which we were trying to get at in a back-handed fashion, I recommend we leave Rule 41 as it presently stands.

RULE 42

Various questions raised in the tentative draft circulated in September remain for consideration.

RULES 43 and 44

No changes recommended.

RULE 45

The changes proposed in the reporter's second draft appear ready for formal approval. Professor Glueck raises the question whether all time provisions should not be in one rule. I am inclined to prefer the other approach -- a person unfamiliar with the criminal rules would, it seems to me, be more likely to be apprised of his time limits if they are included in the rule dealing with the particular subject -- Rule 37, e.g., -- than if he had to find a general rule headed Time. Professor Glueck also refers to the time period in Rule 39(d). But Rule 45 basically applies only to the district courts. I assume that the committee on Appellate Rules will provide separately for time periods within the jurisdiction of the appellate courts.

RULE 46

The revised rule with the questions raised in the reporter's second draft is ready for consideration and formal approval. I recognize that there are many practical problems here. However, I recommend that the rule be approved for circulation in substantially its present form. We should learn a good deal with reference to the practical problems from the comments received after circulation. I don't see how we can resolve them otherwise. Nor should we feel that we are "backing down" if we have to make substantial changes in the light of comments. After all, we will be circulating only a "Tentative Draft of Proposed Amendments", not our definite recommendations.

RULES 47-60

There have not yet been enough committee comments on these rules to call for special discussion. Mr. Blue suggests opposition to the change proposed in Rule 55 and doubt as to much of that in Rule 56. Judge Walsh also opposes the change in Rule 55.